89-674

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

Petitioners,

—v.—

THE LONG ISLAND RAILROAD COMPANY, *et al.*,

Cross-Petitioners.

CONDITIONAL CROSS-PETITION OF THE LONG ISLAND RAIL ROAD COMPANY AND METRO-NORTH COMMUTER RAILROAD COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Section 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, requires a union to maintain the status quo by not engaging in a sympathy strike until it has invoked and exhausted the Act's procedures for resolving major disputes.

LIST OF PARTIES

A complete list of the parties in the proceedings below is set out in Appendix G to the petition in No. 89-427.

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Cross-petitioners, The Long Island Rail Road Company and Metro-North Commuter Railroad Company (the "Railroads"), conditionally cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on April 10, 1989.

OPINIONS BELOW

Cross-petitioners conditionally seek review of a decision of the United States Court of Appeals for the Second Circuit, *Long Island Railroad v. International Association of Machinists*, 874 F.2d 901 (2d Cir. 1989), affirming the United States

District Court for the Southern District of New York (Nos. 89 Civ. 1536 (RPP), 89 Civ. 1535 (RPP), 89 Civ. 1516 (RPP), 89 Civ. 1504 (RPP)).

JURISDICTION

This cross-petition is filed pursuant to Rule 19.5 of the Rules of this Court. The Railroads do not seek review of the question presented by this cross-petition unless the petition in No. 89-427 is granted.

The judgment of the Court of Appeals is dated April 10, 1989 and was entered on that date. The Court of Appeals denied a petition for rehearing on May 16, 1989. On August 2, 1989, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to September 13, 1989. (Pet. App. 92a)[1] The petition for certiorari in connection with which the cross-petition is filed (No. 89-427) was received on September 22, 1989.

This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In addition to the statutes set forth in the petition in No. 89-427, a statute involved is Section 5, First, of the Railway Labor Act ("RLA"), 45 U.S.C. § 155, First, which provides:

> The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

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1 References to pages in petitioners' appendix in No. 89-427 are designated as "Pet. App. _____." References to pages in the petition in No. 89-427 are designated as Pet. _____."

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

45 U.S.C. § 155, First.

STATEMENT OF THE CASE

The Railroads are commuter rail carriers operating in interstate commerce. Together, they carry approximately 350,000 daily commuters between New York City and suburbs to the north and east. The Long Island Rail Road also carries freight in interstate commerce. (Pet. App. 35a-36a)

On March 4, 1989, the International Association of Machinists ("IAM") commenced a lawful strike against Eastern Air Lines. In connection with that strike, the IAM informed the

National Mediation Board of its intent to engage in picketing against neutral secondary employers, including the Railroads, commencing on March 6, 1989. (Pet. App. 16a)

On March 5, 1989, the District Court granted the Railroads' request for a temporary restraining order restraining their union-represented employees from honoring picket lines established by the IAM. On March 13, 1989, after a two-day hearing, the court issued a preliminary injunction barring petitioners (the "Unions") from directing their members to honor IAM picket lines established at the Railroads' facilities.[2] The court observed, *inter alia*, that the Unions had stipulated that "if the defendant unions urge and encourage their members to honor IAM picket lines, the members are not likely to cross those lines and the plaintiff railroads will be forced to cease operations." (Pet. App. 39a) In addition, "all defendant unions other than UTU have urged, encouraged and in some instances directed their members not to cross an IAM picket line." (Pet. App. 40a)[3] The court concluded "that the purposes of the RLA 'to avoid any interruption of commerce or the operation of a carrier' and the Act's imposition of a duty requiring the exhaustion of settlement procedures . . . would be a nullity were a temporary injunction not to issue." (Pet. App. 52a)

The United States Court of Appeals for the Second Circuit affirmed the District Court's decision enjoining the threatened sympathy strike. The court held that the collective bargaining agreements between the Railroads and the Unions were reasonably susceptible to the interpretation that sympathy strikes are not permitted, and that the Unions should therefore be enjoined pending arbitration of the "minor" dispute raised by the threatened strike. While the issue was extensively briefed and argued, the Court of Appeals did not address whether the Unions should be required to exhaust the major dispute resolu-

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2 The court also issued injunctions against threatened sympathy strikes by employees of New Jersey Transit Rail Operations, Inc. and the National Railroad Passenger Corp. ("Amtrak").

3 The court found that the UTU had "asked," but not ordered, its members not to cross picket lines. (Pet. App. 39a-40a)

tion procedures of the RLA before engaging in a sympathy strike.

REASONS FOR GRANTING THE WRIT

The Court of Appeals did not address, and left unanswered, whether Section 2, First, of the RLA—which requires carriers and unions representing their employees "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce"—prohibits a union from engaging in a sympathy strike without first invoking the services of the National Mediation Board ("NMB"). If, as the Railroads contend, the Unions must invoke mediation, then a sympathy strike cannot occur until the mediation process has been exhausted. Under the Court of Appeals' decision, on the other hand, the Unions may engage in a sympathy strike, subject only to their obligation to arbitrate before hand whether the collective bargaining agreements permit them to do so.

If the Court is to address at all whether a sympathy strike may be enjoined under the RLA, it should consider that question in the context of both the major and minor dispute resolution procedures so as to provide guidance concerning the rights and obligations of carriers and their employees in these essential industries.

A UNION MAY NOT ENGAGE IN A SYMPATHY STRIKE BEFORE EXHAUSTING THE MANDATORY MEDIATION PROCESS

Section 2, First, of the RLA provides:

> It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to*

> *the operation of any carrier* growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First (emphasis added). This Court has described Section 2, First, as the "heart of the Railway Labor Act." *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969).

Consistent both with the mandate of Section 2, First, and with the Act's "major purpose . . . to provide a machinery to prevent strikes," the RLA establishes "an integrated, harmonious scheme" for the peaceful resolution of *all* disputes between carriers and their employees. *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 148 n.13, 152 (1969) (citation omitted). This statutory scheme includes procedures for the resolution of "minor" disputes, which relate "either to the meaning or proper application" of a collective bargaining agreement, and of "major" disputes, which typically relate to "the formation of collective agreements or efforts to secure [or change] them." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945).

Unlike minor disputes, which are subject to compulsory arbitration, 45 U.S.C. § 153, major disputes are subject to the "rather elaborate machinery" of Sections 5, 6, 7 and 10 of the RLA. *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 148. Those provisions prescribe a lengthy process of "negotiation, mediation, voluntary arbitration and conciliation." *Id.* at 148-49. As the Court observed in *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), the major dispute resolution procedures of the RLA are "purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[4]

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4 The process is even longer and more drawn out in the context of publicly-funded commuter railroads. Under 45 U.S.C. § 159a, the status quo period for major disputes involving commuter railroads can be lengthened upon request of either party. The provision demonstrates that Congress intended to reduce even further the possibility of strikes against commuter rail carriers.

Carriers and unions must maintain the status quo pending completion of the statutory procedures for resolving major disputes. *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 153 (footnote omitted). *See also Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 378 ("[w]hile the [major] dispute is working its way through these stages, neither party may unilaterally alter the status quo"). This obligation derives from the explicit status quo obligation of Sections 6, 7 and 10, and from Section 2, First, which imposes an "implicit status quo requirement." *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. at 151.

In *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570 (1971), the Court reiterated that Section 2, First, is not a "mere statement of policy or exhortation," and held that a strike called before the statutory dispute resolution procedures are exhausted violates the union's status quo obligation and may be enjoined notwithstanding the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*. 402 U.S. at 577.

The scope of Section 2, First, is not limited to disputes over the formation, alteration, or interpretation of collective bargaining agreements. The statute directs carriers and unions to exert every reasonable effort to settle *all* disputes "whether arising out of the application of such agreement *or otherwise*." 45 U.S.C. § 152, First (emphasis added). *See also Summit Airlines v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980) (relying on Section 2, First, to uphold an injunction against recognitional picketing).

The "major" dispute resolution procedures accordingly extend beyond the traditional category of major disputes over changes in rates of pay, rules, or working conditions. Section 5, First, of the RLA vests the NMB with broad authority to mediate "*any* other dispute not referable to [arbitration] and not adjusted in conference between the parties or where conferences are refused." 45 U.S.C. § 155, First (b) (emphasis added). As the court observed in *CSX Transportation, Inc. v. United Transportation Union*, 879 F.2d 990, 996 n.4 (2d Cir. 1989)

(emphasis in original), the RLA "adopts a comprehensive scheme which addresses *all* disputes between RLA carriers and employee representatives, and . . . the category of disputes amenable to RLA mediation procedures is accordingly not confined to the *Elgin* description of those which 'in general' are 'regarded traditionally' as 'major.' "

This interpretation is supported by the legislative history of the RLA. As originally enacted in 1926, Section 5, First, vested the Board of Mediation (later replaced by the NMB) with authority to adjust three categories of disputes:

> (a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;
>
> (b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions;
>
> (c) *Any other dispute not decided in conference between the parties.*

Railway Labor Act of 1926, ch. 347, § 5, First, 44 Stat. 577, 580 (1926) (emphasis added) (quoted in *Summit Airlines v. Teamsters Local 295*, 628 F.2d at 790).[5] During the hearings that preceded enactment of the RLA, Donald Richberg, counsel to the unions,[6] testified that the "any dispute" language—paragraph (c)—was intended to be a "catchall" provision.

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5 In 1934, Congress amended the RLA to require arbitration of minor disputes. Accordingly, Section 5, First, was amended to delete what was originally subsection (a), and subsection (c), now subsection (b), was amended to read: "Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." 45 U.S.C. § 155, First. *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945).

6 The RLA, as enacted in 1926, was "legislation agreed upon between the railroads and [their unions]." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 753 (Frankfurter, J., dissenting). The Court has in the past relied on Mr. Richberg's testimony. *See Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. at 576.

> [W]e hope to make clear in the law the three types of disputes. It was merely for that purpose. We discussed this and said we could say "any dispute," but we do not think it would make it perfectly clear. . . . We wanted to make it clear that there were other kinds of disagreements . . . [a]ll those types of disputes . . . not specifically covered in A and B, and so to have a catchall we put in C any other disputes. The reason is for clarification of the intent of the law.

Hearings on H.R. 7180 Before the House Comm. on Interstate & Foreign Commerce, 69th Cong., 1st Sess. 70-71 (1926) (quoted in *Summit Airlines v. Teamsters Local 295*, 628 F.2d at 791).

In the courts below, the Railroads asserted that the Unions may not engage in a sympathy strike without first exhausting the major dispute resolution procedures of the RLA. The Railroads also contended that sympathy strikes are not permitted under their collective bargaining agreements, and that the Unions' threat to engage in such a strike created a "minor" dispute that must be arbitrated before a strike could occur. The Court of Appeals concluded that the Unions' sympathy strike raised a minor dispute and should be enjoined pending arbitration. The Court of Appeals did not address the Railroads' argument that the strike should be enjoined pending exhaustion of the major dispute resolution procedures.

Those procedures, however, apply to sympathy strikes. As this Court observed in *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, the "status quo" includes the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S. at 153 (footnote omitted).

As there is no "right" to strike under the collective bargaining agreements at issue, the Unions' threat to strike was an attempt to change those agreements unilaterally without resort to the procedures mandated by Section 6. A strike, moreover, whether undertaken out of self-interest or out of "sympathy"

with another union, creates a dispute between the parties and represents a radical change in working conditions. Neither logic nor precedent suggests that a union which has not yet invoked the RLA's major dispute resolution procedures should be relieved of any obligation to do so before striking simply because some *other* union has exhausted those procedures and become free under the Act to engage in secondary picketing.

Even assuming, however, that a "sympathy" strike does not involve a dispute over "rates of pay, rules, or working conditions", such a strike involves a "dispute" that is amenable to negotiation and mediation pursuant to Section 5, First (b), of the RLA.[7] Given the obligation imposed by Section 2, First, to exert every reasonable effort to resolve *all* disputes and to make and maintain agreements in order to avoid interruptions to the operation of any carrier, a union is required to exhaust mediation before undertaking a strike of *any kind*.[8] Any other result would create an anomalous gap in the structure of the RLA.

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7 Although the Unions contended below that their threatened sympathy strike did not involve a "dispute" with the Railroads, that claim was rejected by both the District Court and the Court of Appeals. (Pet. App. 23a-24a; 53a-55a) In fact, the District Court specifically found that the threatened "sympathy" strike was motivated in part by a desire to prevent the use of "Lorenzo-type tactics" by the Railroads. (Pet. App. 54a)

8 Whether mediation between the Railroads and the Unions would be fruitful is not for the courts—or the parties themselves—to decide. As the court observed in *International Ass'n of Machinists v. National Mediation Board*, 425 F.2d 527, 541 (D.C. Cir. 1970):

> It may well be that the likelihood of successful mediation is marginal. That success of settlement may lie in the realm of possibility, rather than confident prediction, does not negative the good faith and validity of the Board's effort. The legislature provided procedures purposely drawn out, and the Board's process may draw on them even to the point that the parties deem them "almost interminable."

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if certiorari is granted in No. 89-427.

Dated: New York, New York
October 23, 1989

Respectfully submitted,

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